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No. 73-348

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

JESSE S. BAGGETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 481 F. 2d 114.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1973. A petition for rehearing was denied on July 26, 1973. The petition for a writ of certiorari was filed on August 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's criminal enterprise involved sufficient interstate activity to violate the Travel Act, 18 U.S.C. 1952.

2. Whether the admission in evidence of testimony relating to conduct for which petitioner had been acquitted in a state court was reversible error.

3. Whether the trial court erroneously limited the scope of cross-examination of a government witness concerning a serious physical ailment which he suffered.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of violating 18 U.S.C. 1952 by causing the interstate movement of a $3,500 check with intent to commit bribery. He was sentenced to imprisonment for fifteen months and fined $5,000. The court of appeals affirmed (Pet. App.).

The evidence shows that from 1954 to 1970 petitioner was a member—and from late 1964 until 1970 the Chairman—of the Board of County Commissioners of Prince George's County, Maryland. Among the responsibilities of the five-member Board was finally deciding (subject only to judicial review for arbitrariness) all applications to rezone land (Oct. 6 Kahler Tr. 62-64).[1]

During the period involved in this case, from approximately 1962 to 1968, Prince George's County experienced rapid growth. A number of land developers and speculators attempted to enhance the value

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[1] The transcript of trial, filed with the Clerk of this Court, consists of separately paginated volumes from October 5-8, 1971, continuously paginated volumes for the remainder of the evidentiary portion of the trial (to October 22, 1971), and separately paginated volumes for the closing arguments, instructions, and jury verdict. Volumes which are separately paginated will be identified by the name of the witness; volumes which are continuously paginated will be identified solely by "Tr."

of their tracts by obtaining rezoning from a rural classification to one which permitted construction of higher-density structures. The process of rezoning began with a review by the Park and Planning Commission, whose advisory opinion would then be given to the County Commissioners. Following a public hearing, the Commissioners would rule on the rezoning application (Oct. 6 Kahler Tr. 52-64).

While petitioner served on the Board of County Commissioners, he solicited and accepted numerous favors from individuals who had zoning applications pending before the Park and Planning Commission or the Board of County Commissioners (Oct. 8 Tessitore Tr. 15-33; Tr. 47-61, 135-136, 272, 278, 303, 308). Among those who bestowed favors upon him were co-defendant Ralph Rocks, a builder and land developer,[2] and William Kahler, an attorney who handled all of the applications for rezoning submitted by the corporations controlled by Rocks (Oct. 6 Kahler Tr. 51). Petitioner was treated to six Florida vacations by Rocks and Kahler. From 1963 to 1966, while petitioner's friend, William J. Stevens, was Chairman of the Park and Planning Commission, Stevens accompanied petitioner on these free trips. When his term of office expired and he was not re-appointed, Stevens no longer was invited (Oct. 8 Stevens Tr. 8, 32-33, 45-47). Most of the trips occurred shortly after either the Board of County Commissioners or the Park and Planning Commission had taken actions favorable to Rocks (Oct. 6 Kahler Tr. 140-146; Oct. 7 Kahler Tr. 4-79).

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[2] Tried separately, Rocks was convicted of violating 18 U.S.C. 1952. Following affirmance of the conviction by the court of appeals, Rocks filed a petition for a writ of certiorari, No. 73-116, which the government has opposed.

Petitioner owned a large farm in Calvert County, Maryland. In December 1963, he negotiated with the sales manager of Ungar Equipment Company, Harwood, Maryland, for the purchase of a new tractor and accessory equipment for $3,500. Petitioner directed the manager to prepare the sale invoice in the name of Rocks Engineering Company (Oct. 6 Fiedler Tr. 12). The tractor and accessory equipment were delivered to petitioner's farm, where they remained for petitioner's private use (Oct. 5 Chapman Tr. 4; Oct. 5 Monnie Tr. 3-21). On Wednesday, December 23, 1963, a check for $3,500 payable to Ungar Equipment Company was prepared at the Washington, D.C. office of the Rocks Engineering Company and signed by Rocks (Oct. 5 Martin Tr. 10-11, 18-19; Oct. 6 Stacey Tr. 14-15; Govt. Exh. 1). Three days later, petitioner appeared at the Ungar Equipment Company office and used the unendorsed check to pay for his tractor (Oct. 5 Sutton Tr. 27, 37-38). The original invoice was never found in the files of the Rocks Engineering Company. When, in 1969, the Internal Revenue Service inquired about this transaction, the comptroller for Rocks Engineering had to obtain a photostatic copy of the invoice from Ungar Equipment Company (Oct. 5 Martin Tr. 12-18; Oct. 6 Hungerford Tr. 6-7). It was the transaction involving the $3,500 check which was the subject matter of the prosecution under 18 U.S.C. 1952.

ARGUMENT

1. Pointing to the absence of direct proof that petitioner crossed a state line to obtain the check from Rocks Engineering Company, petitioner argues that his conduct was essentially local and therefore

did not violate the Travel Act. 18 U.S.C. 1952.[3] A similar contention has been made in the petition for a writ of certiorari filed by co-defendant Rocks (No. 73-116; see no. 2).[4] However, the bribe of petitioner involving the $3,500 check did entail a significant use of facilities in interstate commerce. It was clearly established that the check drawn by Rocks in the District of Columbia and used by petitioner in Maryland, itself physically moved interstate. While the evidence does not indicate whether petitioner personally moved it or himself arranged the details of its movement, he was

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[3] 18 U.S.C. 1952 provides, in pertinent part:

(a) Whoever travels in interstate * * * commerce or uses any facility in interstate * * * commerce, including the mail, with intent to-

(1) distribute the proceeds of any unlawful activity; or

* * * * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1) * * * and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section, "unlawful activity" means * * * extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

[4] As we have indicated in our response to Rocks' petition (a copy of which is being served on petitioner), the numerous trips to Florida and elsewhere demonstrated that interstate movement was a signficant characteristic of the corrupt relationship between petitioner and Rocks or Kahler. The evidence at petitioner's trial also established that he was a frequent visitor to the District of Columbia office of Rocks Engineering (Oct. 5 Martin Tr. 43-44). Thus, the single instance of the $3,500 check charged in the indictment was not an isolated interstate occurrence in an otherwise wholly intrastate criminal enterprise.

a participant with Rocks in an illegal bribery scheme pursuant to which the check was moved via facilities of interstate commerce and is therefore legally responsible for its movement from Rocks to him. *United States* v. *Lee*, 448 F. 2d 604 (C.A. 7), certiorari denied, 404 U.S. 858; *United States* v. *Salsbury*, 430 F. 2d 1045 (C.A. 4); *United States* v. *Wechsler*, 392 F. 2d 344 (C.A. 4), certiorari denied, 392 U.S. 932.

The three cases primarily relied upon by petitioner, *Rewis* v. *United States*, 401 U.S. 808, *United States* v. *Archer*, decided July 12, 1972 (C.A. 2),[5] and *United States* v. *Altobella*, 442 F. 2d 310 (C.A. 7), have been distinguished in our brief opposing certiorari in Rocks, No. 73-116 (Br. in Opp. 15-17).[6] We rely on that discussion here, adding only that, as the Second Circuit made clear in an opinion in response to the government's petition for rehearing in *Archer* (a copy of which is attached hereto as an appendix), the holding in that case is confined to the situation in which the sole interstate activity involves an undercover law enforcement officer, which is not the case here.

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[5]Supplemental Brief in Support of Petition, App. 1a-23a.

[6]The Seventh Circuit, which decided *Altobella*, reached a similar conclusion a month later in *United States* v. *McCormick*, 442 F. 2d 316, upon which petitioner also relies, involving the use of a local newspaper to advertise an illegal lottery, where the only connection with interstate commerce was the fact that the newspaper had an out-of-state circulation of less than 500.

Petitioner also argues that the government has not shown a connection with organized crime (Pet. 12). But such a connection is not a requisite to violation of the Travel Act. See *United States* v. *Roselli*, 432 F. 2d 879, 884-886 (C.A. 9), certiorari denied, 401 U.S. 924. Petitioner also contends that the district judge should have instructed the jury that it must find that he intended to use an interstate facility and knew that he was using one (Pet. 13). Contrary to his contention, however, the Fourth Circuit in *Salsbury*, *supra*, did not decide whether such intent and knowledge were elements of the offense, and other courts have rejected petitioner's position. *United States* v. *Roselli*, *supra*, 432 F. 2d at 891; *United States* v. *Hanon*, 428 F. 2d 101, 108 (C.A. 8), certiorari denied, 402 U.S. 952; *United States* v. *Miller*, 379 F. 2d 483 (C.A. 7); see *United States* v. *De Cavalcante*, 440 F. 2d 1264, 1268 (C.A. 3); *United States* v. *Blassingame*, 427 F. 2d 329 (C.A. 2), certiorari denied, 402 U.S. 945. These cases correctly hold that the government need prove only that petitioner intended to engage in an unlawful activity.

2. In 1967 petitioner had been acquitted in a state court of a charge that he accepted a bribe from Daniel Tessitore, a home builder in Prince George's County, who alleged that, while a zoning application was pending, the local police chief had advised him that he was expected to help construct an addition to petitioner's home. The work was begun two days after the (up to then) long delayed zoning application was approved; Tessitore did not request payment for his work nor did he receive it.

At petitioner's federal trial, the court permitted the government to use Tessitore as a witness for the limited purpose of showing intent and pattern of conduct (Oct. 8 Tessitore Tr. 4-26). Later, the defense was permitted to read to the jury the state court's verdict and opinion (Tr. 1281-1283). In its closing charge, the court dealt at length with the limited manner in which the jury would be permitted to consider the Tessitore transaction and other evidence of acts of misconduct not charged, indicating specifically that, as to the Tessitore matter, the jury could also take into consideration the not guilty verdict (Oct.27 Instructions, Tr. 18-21).

In this Court petitioner, invoking the doctrine of collateral estoppel, claims that the government should not have been allowed to use Tessitore's testimony against him in view of the previous acquittal in the Maryland court. However, the collateral estoppel rule does not apply to this situation. In *Ashe* v. *Swenson,* 397 U.S. 436, 443, this Court defined "collateral estoppel" to mean that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." The federal government was not a party to the state trial. The state acquittal could no more bar the use of Tessitore's testimony at the federal trial than it would bar prosecution for the identical offense of which petitioner had been acquitted, if the same conduct had also violated federal law. See *Abbate* v. *United States,* 359 U.S. 187; *Bartkus* v. *Illinois,* 359 U.S. 121; *United States* v. *Smith,* 446 F. 2d 200 (C.A. 4); *United States* v. *Synnes,* 438 F. 2d

764 (C.A.), vacated on other grounds, 404 U.S. 1009[7] Petitioner presents no persuasive reason to discard the "dual sovereignty" doctrine in the present context.

In any event, the Tessitore incident was only one of several introduced for the limited purpose of showing petitioner's state of mind and pattern of conduct. In light of the other abundant evidence on this matter, coupled with the jury's awareness that petitioner had been acquitted in the state court of bribery arising from Tessitore's gratuitous work, the introduction in evidence of testimony relating to the Tessitore matter, if error, was harmless beyond a reasonable doubt. See *Harrington* v. *California,* 395 U.S. 250; *Chapman* v. *California,* 386 U.S. 18.

3. At trial, William Stevens, the former Park and Planning Commission Chairman, testified as a government witness and revealed that he was then serving a sentence for income tax evasion and was confined at the Federal Medical Center, Springfield, Missouri. He also indicated that the government had agreed not to oppose his motion for a reduction of sentence if he testified truthfully. On cross-examination, counsel attempted to elicit testimony that Stevens was suffering from a cancer known as Hodgkin's disease. Defense counsel told the court that his purpose was to show that Stevens was in such a debilitated condition, ostensibly from being deprived of medicine when he made his agreement with the government, that one might infer that he had been "pressured to testify to things that are simply not accurate." (Oct. 8

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[7] *Wingate* v. *Wainwright,* 464 F. 2d 209 (C.A. 5), relied upon by petitioner, does not involve different sovereignties and is therefore inapposite. See *id.* at 213, n. 3.

Stevens Tr. 101). The court rejected counsel's request, indicating that the crucial issue was whether the witness was telling the truth at trial. The court agreed to allow counsel to ask the witness about his present medication and alertness, but would not allow the nature of the disease to be revealed, because it might evoke undue sympathy on behalf of the witness.

Counsel conducted a brief inquiry into Stevens' medication along the lines permitted by the court and then closed his cross-examination. The questioning did not produce any suggestion that Stevens felt that he was being coerced into serving as a government witness. Nor did counsel ever substantiate his conjectural claim of pressure arising from deprivation of medicine. Nothing occurring during this incident warrants further review of the conclusion of the courts below that the right of cross-examination was not impaired by the exercise of the trial judge's "full discretion in limiting the nature and scope of cross-examination." *United States* v. *Polakoff*, 439 F. 2d 1113 (C.A. 5).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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NOVEMBER 1973.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1039—September Term, 1972.
1040
1041

Decided September 26, 1973.

Docket Nos. 73-1527
73-1528
73-1711

UNITED STATES OF AMERICA,

Appellee,

v.

NORMAN ARCHER, FRANK R. KLEIN and LEON WASSERBERGER,

Defendants-Appellants.

Before:

FRIENDLY, FEINBERG and MANSFIELD,

Circuit Judges.

ON PETITION FOR REHEARING

PAUL J. CURRAN, United States Attorney for the Southern District of New York (Rudolph W. Giuliani, John W. Nields, Jr., and John D. Gordan III, Assistant United States Attorneys), *for Appellee.*

MAURICE H. NADJARI, Deputy Attorney General (Peter J. O'Connor, Special Assistant Attorney General), *for the Office of Special Prosecutor, State of New York, amicus curiae.*

FRANK S. HOGAN, District Attorney, New York County (Alfred J. Scotti, Chief Assistant District Attorney, and Michael R. Juviler, Assistant District Attorney), *amicus curiae.*

MICHAEL ARMSTRONG, District Attorney, Queens County, *amicus curiae.*

PER CURIAM:

Beginning with a nine-page description of the background alleged to have justified its setting up the crime with which defendants were charged, the Government attacks both what it characterizes as dicta in our opinion and the precise holding that the use of interstate and foreign telephone facilities in this case did not suffice to bring the defendants within the Travel Act.

Although the record does not contain proof of many of the facts now called to our attention by the Government for the first time as evidence of the background of its investigation, we do not question that the federal prosecutors had been given abundant information about the widespread fixing of cases in the Queens County District Attorney's office,[1] some of which, we are now told, may have

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1 This came in principal part from a commission established in 1970 by Mayor Lindsay of New York City and chaired by Whitman Knapp, Esq., a distinguished lawyer who has since become a judge of the District Court for the Southern District of New York. According to the Government's petition, the Knapp Commission sought the assistance of the Department of Justice; the New York City Police Commissioner "thoroughly endorsed" a federal investigation of the Queens County

involved conduct violating the Travel Act, 18 U.S.C. § 1952. We readily appreciate the justified indignation this aroused and can understand the consequent desire of federal law enforcement officials to clean these Augean stables of the State. That Archer has been dismissed from his post as a result of the Government's efforts is indeed a "good" result, as the petition repeatedly emphasizes. None of this, however, is relevant to the sole issue decided, namely, that the evidence here did not show a federal crime under a fair reading of the Travel Act.

The Government devotes much of its petition to issues which we felt desirable to ventilate in view of the appellants' arguments but were at pains neither to decide nor to pronounce dicta. Nine pages of the petition are devoted to an attempt to show that the Government agents committed no crimes and that what it chooses to call the "investigating technique" here employed "was entirely proper," although we expressly left "resolution of this difficult question for another day," —— F.2d at ——, slip opinion at 4821. The final pages of the petition stoutly maintain that "The Government's investigation of local corruption in this case was a proper and necessary use of federal power." The case for this assertion would certainly be stronger if, as the Government advises us now, as it did not in its brief or argument, there was reason to believe that the local corruption in Queens had involved some violations of the Travel Act. But we specifically declined to decide whether we could or should dismiss the prosecution as an abuse of federal power, —— F.2d at ——, slip opinion at 4823. We thus need only consider

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prosecutor's office; and "the United States Attorney disclosed the plan to a member of the state judiciary with administrative responsibility over the state court system in Queens." While this lessens the offensiveness to the State of the conduct here at issue, local invitations cannot expand the constitutional and legislative limitations on federal criminal jurisdiction.

Point I of the petition, in which the Government urges that we gave too narrow a reading to the Travel Act.

Despite the copious citation of cases, including many not included in its original brief, not one of the Government's citations supports application of the Travel Act where the sole "federal" elements were telephone calls from or to an undercover agent. Despite grave reservations whether interstate or foreign travel or transportation or use of interstate or foreign telephone facilities by an undercover agent, as distinguished from actual participants in the crime, can ever supply the federal jurisdictional basis required by the Travel Act, we left open the possibility that this might suffice when sufficiently pervasive or functional. Our holding was on the narrow basis that these conditions were not here fulfilled. In its petition for rehearing, the Government argues that there was at least evidence of an agreement to make interstate or foreign calls, thus justifying the conviction on the conspiracy count, and that legislative history and prior decisions require us to hold that the Las Vegas and Paris calls were sufficient to invoke the Travel Act. We disagree.

On the first point, the Government asserts that "Klein and Wasserberger had, before any actual travel or use of an interstate facility, agreed to use such facilities to promote the bribe." However, the Government greatly overstates the evidence as to the alleged agreement. The transcript of the tape recording of the critical conversation between Bario, Wasserberger and Klein reveals the following: Klein said he must have the bribe money in advance. For that purpose he needed a way to get in touch with Bario. Bario responded that he had no phone in Las Vegas and that he would be out of the country a great deal in the near future. He added that Wasserberger knew whom to call to ensure that the money would be there on time. "There are some people who know exactly where I am at

all times," Bario assured Klein. That answer seemed to satisfy Klein, for he made no further inquiries concerning Bario's whereabouts.

Bario and Wasserberger then left Klein's office. The Government states that "Wasserberger and Bario agreed that Bario should call Klein directly to find out if Klein could guarantee that the case would be fixed." That characterization, however, is misleading. Actually, Bario independently proposed that he should call Klein, and he made no mention of where he would be at the time he intended to call. Contrary to the Government's assertion, Bario was given no instructions to call Klein's office on April 25 or any other date; in fact, when Bario called, Klein could only say that he would have some news for him the next day.

The Government insists that it was only after Klein and Wasserberger had exerted great pressure on Bario that he was forced to contrive a Las Vegas "cover." Yet the pretended Nevada connection had been part of the Government's plan from the first. Bario testified at trial that when Klein asked where he lived, he gave the Las Vegas address that the Government had originally supplied for him on his identification papers. Later, while Bario and Wasserberger were driving back to Manhattan, Wasserberger mentioned that he might someday want to visit Las Vegas. It was in response to Wasserberger's expression of interest in visiting him there that Bario volunteered he could be reached at the Sahara Hotel.

In light of this evidence, there is no indication that the defendants agreed either to make or to cause to be made any interstate or foreign telephone calls. At the conclusion of the meeting, Klein expected that he could reach Bario by calling Wasserberger; through Bario's subsequent fabrication, Wasserberger learned—or thought he learned—that Bario could be reached at the Sahara Hotel,

but no plans were made for Wasserberger to call him there. The Government points to no further evidence of any agreement.

Besides insisting that the defendants agreed to make interstate or foreign calls, the Government disputes our conclusion that the calls themselves were insufficient to invoke the Travel Act. While it has wisely abandoned its reliance on the Newark calls, it contends that Bario's call from Paris and Wasserberger's unsuccessful attempts to reach Bario in Las Vegas sufficed to meet the jurisdictional requirements of § 1952. We disagree. The Nevada calls are of no jurisdictional significance. Although the Government insists that those calls were not "planted," but were "suggested, pressed for and accomplished solely by the defendants without any encouragement by Bario and despite Bario's actively discouraging such calls," the evidence summarized above shows that Bario volunteered the story about reaching him at the Sahara Hotel, consistent with the Government's design to present him as a Las Vegas underworld figure. Moreover, while Wasserberger made the calls in an effort to convey information to Bario about the proposed bribe attempt, there was no possibility at any time that the calls could further the enterprise or even go through to the intended recipient.[2]

The Government insists that the Paris call was one that the defendants "caused" Bario to make, but it is clear from

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2 The Government cites *United States* v. *Hedge*, 462 F.2d 220 (5 Cir. 1972), as contrary to the result reached here. In that case the Mississippi-based defendants ordered numerous sets of dice from a Las Vegas manufacturing company for which one of them worked as a salesman. The dice arrived in the mail, but the defendants refused to pay for them and they were returned unclaimed. The court upheld their Travel Act convictions even though there was no direct relationship between the use of the mails and the subsequent unlawful gambling. Unlike the Las Vegas calls here, the dice shipment was a bona fide operation which, until the defendants refused delivery, had every prospect of promoting the gambling enterprise.

the evidence outlined above that Bario made the call on his own initiative. The Government places great weight on the fact that Bario was in Paris on legitimate business and was not sent there solely to manufacture jurisdiction in this case. But that fact alone is not sufficient to qualify the Paris call. Any such holding would permit the Government to convert any local bribery it had provoked into a federal offense by furnishing an out-of-state address for an undercover agent or sending him outside the state on a legitimate errand and having a call made before the offense was consummated. The Travel Act confers ample power on federal law enforcement officers to assist local officials without going so far. Both the legislative history summarized in our opinion and the additional extracts relied on in the Government's petition show that the overriding Congressional purpose was to permit the federal government to act against members of organized crime whose activity crossed state lines when local law enforcement officers were unable or unwilling to do so—not to extend federal power to deal with corruption in local prosecutors' offices by affording the corrupters an opportunity to use interstate or foreign telephone facilities in dealing with an undercover agent on any such "casual and incidental" basis as here. See *United States* v. *Corallo*, 413 F.2d 1306, 1325 (2 Cir.) , *cert. denied*, 396 U.S. 958 (1969).

While the Government professes alarm at the precedential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here. We adhere to that holding and leave the task of further line-drawing to the future.

The petition for rehearing is denied.